

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NASIR L. BANKS,

Defendant-Appellant.

UNPUBLISHED

September 30, 2003

No. 239520

Wayne Circuit Court

LC No. 00-006875-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NASIR L. BANKS,

Defendant-Appellee.

No. 245070

Wayne Circuit Court

LC No. 00-006875-02

Before: Owens, P.J. and Griffin and Schuette, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316. Following a jury trial, he was convicted of the lesser offense of second-degree murder, MCL 750.317, and sentenced to 80 to 120 months' imprisonment. In Docket No. 239520, defendant appeals as of right from his conviction. After he was sentenced, defendant moved for a new trial, arguing that his conviction was against the great weight of the evidence. The trial court granted the motion. In Docket No. 245070, we granted the prosecutor's application for leave to appeal that ruling and ordered the appeal consolidated with defendant's appeal in Docket No. 239520. We now affirm defendant's conviction, and reverse the order granting defendant a new trial.

I. Factual Background

On May 20, 2000, defendant Nasir Banks (a/k/a "Lamont") and codefendant Rahman Banks (a/k/a "Rock") were sitting with friends on the front porch of a four-unit house in which they both resided. Lajuan McDonald and Olympia Erica Johnson came up to the porch. One of the men on the porch, Latoye Keith, thought it odd that McDonald had approached the Banks

brothers because Rahman Banks and McDonald had argued over a dice game a week or two earlier. McDonald's mother testified that Rahman Banks had been threatening her son, and he had packed and planned to leave home on May 21. Johnson testified that McDonald walked up to the porch because one of the men on the porch, Vernard Keith, had called him up.

Soon after, two women—Jasmine Montgomery and Octavia Renfroe—joined the group. As they approached the porch, they heard Johnson and McDonald talking about sex, and McDonald said he was going to expose his penis. McDonald may have unbuckled his pants. Rahman Banks told McDonald to get off the porch and to take the women with him. As the women and McDonald departed toward the back of the house, McDonald exchanged words with Rahman Banks. Nasir Banks jumped off the porch with a baseball bat, and chased McDonald. As he was doing so, Rahman Banks yelled, "Catch him and beat his ass". Rahman Banks then went in the front door of the house.

McDonald and the women started running. Behind the house, McDonald slipped and fell in a mud puddle. Johnson testified that she saw Nasir Banks poised to hit McDonald with the bat, but she did not see him hit McDonald because she ran off in another direction. While running away, she saw Rahman Banks emerge from the back door with a handgun and run toward the mud puddle.¹ Montgomery saw a man in dark clothing chasing McDonald, but she did not know the Banks brothers well enough to identify which one was chasing him. Montgomery heard two gunshots a few seconds later as she was running away; Johnson heard three gunshots.

Johnson testified that both Nasir Banks and Rahman Banks were dressed in dark clothing that evening. Octavia Renfroe agreed that both brothers had dark clothes, as did Vernard Keith. Renfroe testified that one of the men in dark clothes struck McDonald with a baseball bat. She heard two gunshots ten or fifteen seconds after she saw McDonald hit with the bat.

Latoye Keith testified that Rahman Banks had been known to carry a handgun and had been involved in selling a gun and silencer.² He believed McDonald did not have a gun, or at least did not have one on the day he was killed, but he could not rule it out. Latoye Keith gave inconsistent testimony about whether Rahman Banks was walking or running toward or away from the scene. He testified that Rahman Banks was trying to cover a handgun in his waistband as he was walking or running, although he also testified that he did not actually see the handgun.

The medical examiner testified that Lajuan McDonald had a cut on his forehead from a blunt force injury consistent with being hit by a baseball bat, but which did not cause death. The cause of death was five gunshot wounds.

¹ In one statement to the police, Johnson denied seeing any gun because she said she was scared and did not want to get involved in the investigation. She also admitted lying about the other women's names.

² Latoye Keith described at least four or five gunshots, which he characterized as "little echoes" and "little gunshots."

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of second-degree murder. We must determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 117 (1993).

The prosecution's principal theory against defendant was that he aided and abetted³ his brother in murdering the victim; the prosecutor argued that defendant had the specific intent to kill.

Defendant and his brother were charged with first-degree murder, MCL 750.316. The jury was also instructed on second-degree murder, MCL 750.317, as a lesser included offense. Consistent with CJI2d 8.01, the jury was instructed on the elements of aiding and abetting:

In this case Defendant Nasir Banks . . . is charged with intentionally assisting someone else in committing the crime of first degree premeditated murder. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor. To prove this charge, aiding and abetting, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the alleged crime was actually committed, either by the Defendant or someone else.

Second, that before or during the crime the Defendant did something to assist in the commission of the crime.

Third, *that the Defendant must have intended the commission of the crime alleged, or must have known that the other person intended its commission at the time of giving the assistance.*

It does not matter how much help, advice, or encouragement the Defendant gave; however, you must decide whether Defendant intended to help another commit the crime and whether his help, advice, or encouragement actually did help, advise, or encourage the crime.

³ "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39.

In this appeal, defendant focuses on the third element, arguing that he did not know that his brother intended to kill McDonald. We reject defendant's argument, primarily because it ignores the alternative prong of the third element.

To convict a defendant of second-degree murder, a prosecutor must prove that the defendant intended to kill or to do great bodily harm or that he acted with willful and wanton disregard of the likelihood that the natural tendency of his actions would be to cause death or great bodily harm. *People v Biggs*, 202 Mich App 450; 509 NW2d 803 (1993). "To be convicted of aiding and abetting, a person must either have possessed the required intent or have participated while knowing that the principal had the requisite intent." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Examining the evidence in a light most favorable to the prosecutor, a rational jury could find that defendant aided and abetted his brother in assaulting McDonald while possessing the requisite intent for murder. The evidence was sufficient to enable the jury to determine that the assault with the bat and the fatal shooting were part of a series of connected events culminating in McDonald's death, rather than isolated activities to be parsed without regard to the surrounding circumstances. The jury properly could have found that defendant assisted his brother by immobilizing McDonald, knowing that his brother at least intended to commit great bodily harm. As this Court observed in *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995), "the intent of the aider and abettor is satisfied by proof that he knew the principal's intent when he gave the aid or assistance." If an aider and abettor participates in a crime with knowledge of his principal's intent to kill *or cause great bodily harm*, he is acting with wanton and willful disregard sufficient to support a finding of malice. *People v Spearman*, 195 Mich App 434, 439; 491 NW2d 606 (1992).

Here, knowing that defendant had a bat, Rahman Banks instructed defendant to catch McDonald and "beat his ass." There was also evidence that it was well known that Rahman Banks carried a handgun. When defendant pursued the victim and struck him on the head after the victim had slipped in the mud, defendant effectively kept the victim immobilized, which enabled Rahman Banks to catch up with his gun. From these circumstances, a rational jury could find that defendant assisted Rahman Banks, with knowledge that Rahman intended for McDonald to sustain great bodily harm, whether by defendant's hand or Rahman's.⁴

Furthermore, the manner in which defendant immobilized McDonald—striking him while he was down with a blow to the head from a baseball bat—permitted the jury to conclude that defendant himself possessed the intent necessary to prove second-degree murder, i.e., that defendant intended to kill, intended to cause great bodily harm, or that he acted with willful and wanton disregard of the likelihood that the natural tendency of his actions would be to cause

⁴ Defendant argues that Rahman merely instructed him to "beat [the victim's] ass," which he argues fails to show an intent to kill. If we were to read those words literally, we would agree that the words do not necessarily demonstrate an intent to *kill*. However, the jury was permitted to infer that defendant understood that phrase to mean something more violent than the literal words. Indeed, defendant exceeded the literal scope of Rahman's command because he struck the victim in the *head* with the bat.

death or great bodily harm. See *People v Williams*, 126 Mich App 717, 720; 337 NW2d 903 (1983) (this Court upheld a plea-based conviction for second-degree murder where the defendant admitted hitting the decedent on the back of the head with a baseball bat).

Although McDonald's death did not result from the blunt force trauma—it actually resulted from the gunshots—defendant's conduct in striking McDonald in the head with a bat was probative of his intent (i.e., the existence of malice) at the time he assisted his brother by immobilizing McDonald. Accordingly, the nature of defendant's *own* conduct supports an inference that he possessed the requisite malice to support a conviction of second-degree murder. *People v Rockwell*, 188 Mich App 405, 412; 470 NW2d 673 (1991) (defendant was properly convicted of aiding and abetting an assault with intent to commit murder where *he* intended to commit murder). We therefore affirm defendant's conviction.

III. Prosecutor's Appeal

For similar reasons, we reverse the trial court's order granting defendant a new trial.

A new trial on the ground that the jury's verdict was against the great weight of the evidence is not favored. *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998). A court considering such a motion should consider whether to overrule the jury with great reserve and with all presumptions running against the grant of a new trial. *Id.* Further, the court may not substitute its view of witness credibility for the jury's determination of credibility. *Id.* at 642. The authority to grant a new trial on the basis that the verdict is against the great weight of the evidence should be invoked only in an exceptional case in which the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *Id.*

In granting defendant's motion for a new trial, the trial court reasoned that defendant

was convicted on an aiding and abetting theory which subsumes that he knew or had reason to know that it was his brother's intent to kill and shoot Mr. McDonald. There's been no evidence that I'm aware of that he knew or had reason to know that his brother was going to enter the house, get a gun, come out and shoot the decedent dead. There certainly is no exchange or evidence before the jury or the Court that there was an agreement to do that known to or participated in by Mr. Nasir Banks as to what his brother had in mind [*sic*].

In deciding the motion, the trial court erred by examining the evidence with an eye toward intent to commit first-degree premeditated murder, without considering the offense of which defendant was convicted, second-degree murder. The court also erred by considering only defendant's knowledge of his brother's intent without regard for defendant's own criminal intent.

If an aider and abettor participates in a crime with knowledge of his principal's intent to kill *or cause great bodily harm*, he is acting with wanton and willful disregard sufficient to support a finding of malice. *Spearman, supra*. An aider and abettor may also be held liable on agency principles when he acts intentionally or recklessly in pursuit of a common plan. *Id.* Regardless of defendant's knowledge of Rahman Banks' intent to kill, the evidence indicated that Rahman Banks saw defendant chase after McDonald with a baseball bat, and instructed him to catch McDonald and "beat his ass," following which defendant struck McDonald in the head

with the bat. As discussed previously, the evidence supported an inference that defendant and Rahman Banks participated in a common scheme to assault McDonald, and that defendant both intended great bodily harm when he struck McDonald in the head with a baseball bat, and was aware of Rahman's intent to cause great bodily harm to McDonald. Additionally, defendant assisted Rahman by immobilizing McDonald, which enabled Rahman to catch up to McDonald and shoot him.

The trial court held that there was a substantial difference between striking McDonald with a bat and Rahman's act of shooting McDonald five times. While there is a factual difference, the court erred by disregarding the legal similarity: from either act, a rational jury could reasonably infer the requisite malice by defendant to support a conviction of second-degree murder. *Biggs, supra*. The trial court erroneously focused only on a narrower view of intent, and erroneously determined that it was necessary that defendant must have known that Rahman intended to kill McDonald. When considering the broader alternative forms of criminal intent that the jury properly could consider, the great weight of the evidence did not preponderate heavily against the verdict and a serious miscarriage of justice would not result if the verdict is sustained. *Lemmon, supra*.

In Docket No. 239520, we affirm defendant's conviction. In Docket No. 245070, we reverse the trial court's order granting defendant a new trial.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette